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No. 93-706

In The

Supreme Court of the United States

October Term, 1993

MICHAEL D. GRIFFES, COMMISSIONER OF THE VERMONT DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

GREG R. BARRINGER and JUDITH M. BARRINGER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. Vermont Imposes One And The Same Tax On Vehicles Whether The Taxpayer Is A "New Resident" Or An "Old Resident."

Respondents suggest that they were denied a tax credit or otherwise disadvantaged because they are "new residents" of Vermont. That is not the case.

Vermont's Motor Vehicle Purchase and Use Tax applies to old and new residents alike. The five percent sales tax applies to all residents who purchase vehicles in Vermont. *See* Vt. Stat. Ann. tit. 32, §8903(a).[1] The five percent use tax applies only if the equivalent sales tax has not been paid. *Id.*, §8903(b). The net result is that all registered vehicles are subject to a single five percent tax.

The tax credit claimed by Respondents is not available to any resident, new or old, who registers a vehicle out-of-state before registering it in Vermont. Until 1986 the credit was denied in these circumstances as the result of an administrative practice. *See Williams v. Vermont*, 156 Vt. 42, 46 n.3, 589 A.2d 840, 843 n.3, cert. denied, 112 S.Ct. 81 (1991) and, cert. denied, 112 S.Ct. 590 (1991). In 1986 the practice was formalized by the adoption of a rule. *Id.*[2]

Respondents argue that the State amended a statute by regulation in an attempt to retain the tax in a "masked form". In fact the State represented to this Court in 1985

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[1] The sales tax does not apply at all to nonresidents.

[2] The credit is only available if " . . . d. The person applying for a Vermont registration has not previously registered that vehicle in the state where it was acquired or in any other state." *See* Agency of Transportation, Department of Motor Vehicles, Rule 86-28-E (July 5, 1986), Section 1.d.

that the tax applied just as the regulation provides. *See Williams v. Vermont*, 472 U.S. 14, 19 (1985). The Court's majority noted then that it was "conceivable that, were a full record developed, it would turn out that in practice the statute does not operate in a discriminatory fashion", *id.*, at 28, and the dissent anticipated the very result – "an administrative regulation clarifying the scope of the exception", *id.*, at 35-36 – that Respondents now portray as a subterfuge.

With the record thus developed and with the regulation in place "[t]he State's submission . . . negate[s] any claim that appellants were treated differently than Vermont residents in similar circumstances." *Id.*, at 19. The Vermont regulation and the Vermont practice are in harmony with the views expressed by this Court:

> . . . [R]esidence at the time of purchase is a wholly arbitrary basis on which to distinguish among present Vermont registrants – at least among those who used their cars elsewhere before coming to Vermont. Having registered a car in Vermont they are similarly situated for all relevant purposes. Each is a Vermont resident, using a car in Vermont, with an equal obligation to pay for the maintenance and improvement of Vermont's roads. The purposes of the statute would be identically served, and with an identical burden, by taxing each.

Id. at 23-24.

2. The Court Of Appeals' Opinion Conflicts With This Court's Precedents Under The Tax Injunction Act.

By its terms the Tax Injunction Act bars federal lawsuits to enjoin state taxes "where a plain, speedy, and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341. This Court has held that it must "construe narrowly" the exception that allows federal jurisdiction where the state remedy is not plain, speedy and efficient. *California v. Grace Brethren Church,* 457 U.S. 393, 413 (1982). It has held that a state remedy will satisfy the statute even though it requires exhaustion of an administrative remedy. *Rosewell v. Lasalle National Bank,* 450 U.S. 503, 507-508 (1981). It has held that federal courts should not assert jurisdiction "on the mere speculation that the [state] courts will not allow the taxpayer . . . to raise arguments going to the constitutionality of the taxes they are required to pay." *Franchise Tax Bd. v. Alcan Aluminum Ltd.,* 493 U.S. 331, 341 (1990). The Court of Appeals disregarded all of these precedents when it assumed jurisdiction in the present case.

Respondents first brought this action in the Vermont Superior Court. They say they bypassed the administrative remedy because the Commissioner of Motor Vehicles "had routinely denied refunds to other individuals without providing a hearing." Brief in Opposition at 4-5. They excuse their voluntary dismissal of the Superior Court action and their immediate resort to federal court on grounds that the Commissioner moved to dismiss the state action for lack of subject matter jurisdiction.

What the Respondents fail to mention is that *before* they filed suit in Superior Court the Vermont Supreme Court had already affirmed the dismissal of an identical Superior Court suit for lack of jurisdiction, and did so because there was "a specific administrative procedure to afford [taxpayers] the remedy to which they are constitutionally entitled." *Williams v. Vermont*, supra, 156 Vt. at 53, 589 A.2d at 847. This ruling recognized that " '[S]ome form of hearing is required' " as part of the administrative process. *Id.* at 52-53, 589 A.2d at 847 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). The details of the hearing procedure are prescribed by Vermont's Administrative Procedure Act, which governs whenever a hearing is "required by law." Vt. Stat. Ann. tit. 3, §§801(b)(2) and 809.

The Commissioner acknowledged and relied on the Vermont Supreme Court's decision when he moved to dismiss the Respondents' Superior Court case. Therefore it is disingenuous for the Respondents (represented by the lawyer who was the plaintiff in Williams) to feign apprehension that the Commissioner would deny them a hearing.

In the present case as in *Alcan* it is not the state remedy that is "uncertain or speculative". What is speculative, and unfounded, is the Court of Appeals' "uneasy feeling" that Vermont might deny Respondents the plain, speedy and efficient remedy that the law requires. By their words and actions the Vermont Supreme Court and the Vermont Commissioner of Motor Vehicles have

confirmed that a complete administrative remedy is available.[3]

3. The Court Of Appeals' Opinion Conflicts With Commerce Clause Precedents.

Respondents' assertions notwithstanding, this Court recognized that Vermont's purchase and use tax "in no way protects local business" and "does not help it." *Williams v. Vermont*, 472 U.S. at 25. The Court also noted that if the tax applied as the regulation now says it does (to everyone who has registered a vehicle out-of-state) Respondents would lack standing to claim discrimination. *Id.*, at 19, n.4. *Goldberg* went a step further, holding that it was "not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989).[4] These precedents refute at least the claim that the tax is discriminatory.

Respondents resist the notion that the tax is in effect a user fee imposed to support the Vermont road system, and even then mischaracterize it as a "flat one-time tax." In fact the tax is a percentage tax, not a flat tax, so the

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[3] The correspondence and rulings appended to Respondents' Brief are wholly irrelevant. The correspondence predates the Vermont Supreme Court's decision in *Williams*. The rulings were issued by the Commissioner of *Taxes*, not the Commissioner of *Motor Vehicles*, pursuant to unrelated statutes.

[4] Respondents argue that *Goldberg* precludes only discrimination claims brought under the Commerce Clause, and then only when the discrimination involves an "abstract claim." Brief in Opposition at 8, n.2. The first point is debatable given the text and the context. The second is fanciful.

cases invalidating the latter do not apply. *See e.g., American Trucking Assns., Inc. v. Scheiner,* 483 U.S. 266 (1987). Moreover, the percentage applies to the depreciated value of the vehicle, thus forgiving a portion of the tax representing the vehicle's use prior to registration in Vermont. *See* Vt. Stat. Ann. tit. 32, §8903(a) and (b) (tax imposed on "taxable cost . . . as defined in 23 V.S.A. §4").

The Court of Appeals' insistence that the tax be "fairly apportioned" beyond a recognition of depreciated value, App. 42-43, distorts the meaning of the language. The consequence of that approach is to grant Respondents a total exemption from the tax in direct conflict with this Court's holding that a fair apportionment does *not* mean no tax at all. *See Container Corporation of America v. Franchise Tax Board,* 463 U.S. 159, 190 (1983).[5]

Respondents' argument that "internal consistency" was not an issue in *Container Corporation* implies, erroneously, that "internal consistency" is a constitutional test apart from "fair apportionment." The purpose of the apportionment requirement is "to ensure that each state taxes only its fair share of *an interstate transaction*", *Goldberg,* 488 U.S. at 260-261 (emphasis added), and "internal consistency" has been the measure of fairness when a

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[5] The contention that Vermont must abandon its present tax in favor of higher gasoline taxes or other pay-as-you-go levies ignores the burden this would impose on those who have already paid the purchase and use tax, and disregards the principle that " 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' " *Williams v. Vermont,* 472 U.S. at 22 (citing *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359 (1973).

business has a tax presence in several states, *id.* However, the present case illustrates the futility of applying an "internal consistency" analysis to a tax on the *intrastate* use of a personal automobile. *See* App. 54, Van Graafeiland, Circuit Judge, dissenting ("neither appellants nor my colleagues state what the Vermont tax should be apportioned with or against").

4. There Are Compelling Reasons For Granting Certiorari.

Respondents dismiss the Tax Injunction Act issue as a state law question unworthy of Supreme Court review. Tax Injunction cases routinely examine state laws to determine whether the state remedy satisfies the Act, the federal question being compliance with the federal law. Supreme Court review is necessary to assure that the Act is construed narrowly in accordance with its terms and the Court's precedents.

Supreme Court review is also necessary to assure consistency with the Commerce Clause precedents. The Court of Appeals' decision disregards the standing requirements of *Goldberg* and *Williams*. It uses the fair apportionment (and "internal consistency") requirement to obtain a result that imposed the "obvious unfairness" rejected in *Container Corporation*. It found discrimination in a statutory framework that was clarified by rule to remove the potential source of discrimination identified in *Williams*.

It is ironic that the taxpayer who successfully advocated for Supreme Court review in *Williams* now argues that review should be denied. The above issues as well as

the one "expressly reserved" in *Williams* and other cases – "whether a State must credit a sales tax paid to another State against its own use tax", 472 U.S. at 21-22 – are deserving of review. Certiorari should be granted.

Respectfully submitted,

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